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No. 90-464

In the Supreme Court of the United States

OCTOBER TERM, 1990

BITUMINOUS COAL OPERATORS' ASSOCIATION, INC.,
PETITIONER

v.

UNITED MINE WORKERS OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The trustees of the 1974 United Mine Workers Benefit Plan and Trust denied coverage to a class of retired miners. The question presented is whether, in applying this Court's decision in *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989), the district court properly reviewed the decision of the trustees under a de novo standard.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner, the Bituminous Coal Operators' Association (BCOA), is a multi-employer bargaining association. About every three years for the last 40 years, it has negotiated a collective bargaining agreement with respondent United Mine Workers of America (UMWA). That agreement, known as the National Bituminous Coal Wage Agreement (NBCWA), governs the terms and conditions of employment of the coal miners employed by members of the BCOA and the companies that sign "me too" agreements with the UMWA. Pet. App. 11a-12a.

In 1950, the BCOA and the UMWA established in the NBCWA the United Mine Workers Welfare and Retire-

ment Fund. Pet. App. 15a.[1] This Fund provided pension and health benefits for active and retired miners "throughout the life of the miner." *Id.* at 16a (district court's characterization). The Fund was governed by a board of three trustees—a BCOA-appointed trustee, a UMWA-appointed trustee, and a mutually selected neutral trustee. Under the terms of the 1950 Trust, the trustees had complete discretion over eligibility requirements and the nature and level of benefits. *Ibid.*

In 1974, the BCOA and the UMWA agreed to restructure the Fund by creating four separate plans: the 1950 Pension Plan, the 1950 Benefit Plan, the 1974 Pension Plan, and the 1974 Benefit Plan.[2] The 1974 Benefit Plan, which is at issue in this case, was established to provide health and other non-pension benefits to active miners and to pensioners who retired after January 1, 1976, and were eligible to receive pension benefits from the 1974 Pension Plan. Unlike the prior collective bargaining agreements, the 1974 NBCWA set forth in specific terms the eligibility requirements for the benefits to be provided to miners, pensioners, and their dependents. Pet. App. 16a-17a; see *Robinson*, 455 U.S. at 566. The grant of authority to the trustees was correspondingly limited to "full authority * * * with respect to *administration* of coverage and eligibility." Pet. 17 (emphasis added).[3]

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[1] The Fund was created pursuant to Section 302(c)(5) of the Labor-Management Relations Act of 1947, 29 U.S.C. 186(c)(5). See *UMW Health & Retirement Funds* v. *Robinson*, 455 U.S. 562, 564-566 (1982). Employees and employers must be equally represented in the administration of a fund established under Section 302(c)(5), but may agree upon one or more neutral representatives to serve as trustees. 29 U.S.C. 186(c)(5)(B); *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 328-329 (1981).

[2] In part, the restructuring was designed to comply with the recently enacted Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* Pet. App. 16a. The 1974 Benefit Plan and Trust is an employee welfare benefit plan within the meaning of Section 3(1) of ERISA. 29 U.S.C. 1002(1). Pet. App. 12a.

[3] Article III of the trust document states:

> Subject to the provisions of the 1974 Benefit Trust, the Trustees shall have full authority, within the terms and provisions of

In 1978, following a 111-day strike in which the continuation of health benefits was the central issue (see Pet. App. 17a-18a), the BCOA and the UMWA agreed that health benefits for active miners and post-1975 retirees would be provided by individual companies. The 1978 agreement also provided that the 1974 Benefit Plan would continue to exist to provide benefits to "any retired miner under the 1974 Pension Plan * * * who would otherwise cease to receive the health and other non-pension benefits provided herein because the signatory Employer (including successors and assigns) is no longer in business." Pet. App. 18a.[4] The agreement did not specify who would provide benefits to persons who had retired from companies that would become non-signatory employers by failing to sign subsequent wage agreements with the UMWA.

2. After the 1978 restructuring, a number of courts held that non-signatory employers were not obligated to provide benefits to their retirees, but that the 1974 Benefit Plan provides a "safety net" for those "orphaned" retirees. Thus, in *District 29, UMW* v. *Royal Coal Co.* (*Royal I*), 768 F.2d 588, 589 (1985), the Fourth Circuit held that a company that had been signatory to the 1978 and 1981 agreements, but had ceased all mine operations and did not sign the 1984 agreement, was not obligated to pay the health benefits of its former employees beyond the expiration of the earlier agreements, even though they had retired during the terms of those agreements.

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the Labor-Management Relations Act of 1947, and other applicable law[,] with respect to administration of coverage and eligibility, methods of providing or arranging for provisions for benefits, investment of trust funds and all other related matters.

[4] The 1981 agreement and subsequent agreements specify that "no longer in business" means that the employer "has ceased all mining operations" and "is financially unable * * * to provide health and other non-pension benefits to its retired miners and surviving spouses" either directly or through any successors, assigns, or related subsidiary or parent corporations. Pet. 6-7 & n.4; see Pet. App. 21a-22a.

Accord *District 17, UMW* v. *Allied Corp.* (*Allied I*), 735 F.2d 121, 124, 133, rev'd on other grounds, 765 F.2d 412 (4th Cir. 1984) (en banc) (*Allied II*), cert. denied, 473 U.S. 905 (1985); *Box* v. *Coalite, Inc.*, 643 F. Supp. 709 (N.D. Ala. 1986). After a remand, the Fourth Circuit held that "the 1974 Benefit Plan must provide health benefits where the successor corporation of the former employer is financially able to provide benefits, but is not legally obligated to do so because it is not a signatory to the wage agreement." *District 29, UMW* v. *UMW 1974 Benefit Plan & Trust* (*Royal II*), 826 F.2d 280, 282 (1987), cert. denied, 485 U.S. 935 (1988). The court concluded "that the intentions of the parties in providing for retirement health benefits was to guarantee their provision for life." 826 F.2d at 282.[5] The Fourth Circuit thus held that the 1974 Benefit Plan must assume health and benefit obligations when the employer's legal obligations have ceased (as set forth in *Royal I*), even if its parent or successor is financially able to pay and therefore is "in business" as defined in the wage agreement. *Id.* at 283.[6]

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[5] The Fourth Circuit based this finding on the general description in each of the succeeding wage agreements that "pensioners who retire before the effective date of each collective bargaining agreement are entitled to health benefits 'for life' and their widows 'until death or remarriage.'" 826 F.2d at 282. Thus, "[d]espite the patent limitation of the liability of the 1974 Benefit Plan and Trust to provide health benefits only 'during the terms of this agreement,' and only where the individual employer is 'no longer in business'" (*ibid.*), the court concluded that "[i]t is apparent from the record that the parties, in moving from a system wherein the health benefits were provided solely by the collective 1974 trust to a regime in which individual employers assumed primary liability, intended to change the method of providing health benefits, but they did not intend to create new, latent loopholes to coverage." *Id.* at 283.

[6] A cord *Grubbs* v. *UMW*, 723 F. Supp. 123 (W.D. Ark. 1989); *Schifano* v. *UMW 1974 Benefit Plan & Trust*, 655 F. Supp. 200 (N.D. W. Va. 1987); see *District 29, UMW* v. *Royal Coal Co.*, 8 Employee Benefits Cas. (BNA) 1556, aff'd, 826 F.2d 280 (4th Cir. 1987), cert. denied, 485 U.S. 935 (1988).

3. This case arose out of a decision by the trustees of the 1974 Benefit Plan to deny coverage to a class of retired or disabled miners (or their dependents) whose last coal mine employers were eight companies that had been signatories to the NBCWA until either 1981 or 1984. Following their decisions not to sign the more recent agreements, these companies either remained in the coal business as non-union employers or otherwise were financially able to provide the benefits either directly or through a related division, parent or subsidiary corporation, or through a successor or assign. Pet. App. 10a-11a, 13a-15a.[7]

The district court stated that "[w]hether the pensioners at bar are entitled to health benefits as a vested, lifetime benefit depends on the intent of the parties to the collective bargaining agreement." Pet. App. 26a, citing, *e.g.*, *International Union, UAW* v. *Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), cert. denied, 465 U.S. 1007 (1984). Characterizing the case as "a straight-forward factual dispute," the court extensively reviewed the collective bargaining history and the resulting agreements and plan documents from 1950 through 1988. Pet. App.

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[7] The courts below consolidated four separate actions. See Pet. App. 1a-7a. Individuals who had been employed by one of the eight companies brought suit, along with their collective bargaining representative, in three of the actions "seek[ing] injunctive relief to compel the 1974 Benefit Plan to provide health and other non-pension benefits, pay all unpaid medical bills and establish an escrow fund to insure payment of such benefits." *Id.* at App. 12a; see *id.* at 11a. The trustees of the 1974 Benefit Plan filed the fourth action, seeking a declaratory judgment to determine its responsibility to provide health benefits to those individuals. *Id.* at 14a. The BCOA intervened and asked for class certification of the individual plaintiffs under Fed. R. Civ. P. 23(b)(2). The district court certified a class of more than 2,100 persons, defined as pensioners, retired or disabled miners, and their spouses and dependents who are or were eligible for benefits under the 1974 Pension Plan and who were employed by non-signatory companies that had signed the NBWA of 1978, 1981, or 1984. The class excludes persons whose last signatory employer's operations were principally within the jurisdiction of the Fourth Circuit. Pet. App. 40a-42a, 53a-55a.

10a; see *id.* at 15a-26a. It noted in particular that in 1978 "the BCOA proposed to eliminate the language contained in the 1974 Agreement that pensioners and disabled miners would retain a health services card 'until death' or 'for life,' and widows 'until death or remarriage,'" but the UMWA refused to eliminate the language and substantially similar language was inserted into the General Description of Plan Benefits in 1978, 1981, 1984, and 1988. *Id.* at 19a. The court further found that the parties were aware, when they negotiated the 1988 NBCWA, of the judicial holdings in favor of 1974 Benefit Plan coverage for the pensioners of former signatory employers. *Id.* at 25a.[8]

In light of this Court's decision in *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989), the district court held that "the appropriate standard of review of the Trustees' decision to deny benefits to these pensioners appears to be *de novo* review." Pet. App. 30a. The court reasoned that neither the collective bargaining agreements nor the plan documents prescribe a different standard; to the contrary, "[s]ince the restructuring of the Funds in 1974, the Trustees are without discretionary authority to establish eligibility standards or to construe the terms of the trust." *Ibid.*

Applying a de novo standard, but stating that application of an 'arbitrary and capricious" test would lead to the same result (Pet. App. 30a), the court discerned a consistent intent to provide lifetime health benefits to the plaintiff class from the language of the past five wage agreements, the 25-year history of lifetime benefits before 1974, and the testimony of the parties to the NBCWA. The court found "no persuasive evidence that

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[8] The court observed that in 1988 the BCOA agreed to increase its contribution to the 1974 Benefit Plan from five to eight cents an hour, and promised that "additional money would be forthcoming if necessary." Pet. App. 25a. The court also observed that the parties agreed in 1988 to require employers who ceased to contribute to the 1950 and 1974 Benefit Plans to pay withdrawal liability to the plans. *Id.* at 25a-26a.

the parties intended to cause the forfeiture of benefits or to create a gap in coverage where an employer is not legally obligated to provide benefits to these pensioners.' *Id.* at 27a.

The court also found that "the collective bargaining agreements and the plan documents are ambiguous concerning whether the employer or the 1974 Benefit Plan is obligated to provide such benefits when the employer is no longer a signatory to the collective bargaining agreement." Pet. App. 27a. However, it determined that the parties never intended to divest pensioners of their rights "in favor of a scheme that would condition receipt of benefits upon the financial condition of an entity that [as a non-signatory] has no obligation to pay benefits." *Id.* at 29a.[9] In addition, citing the *Allied* and *Royal* decisions among others, the court noted that, "[w]ithout exception," the courts had held that an individual employer's obligation to provide health benefits did not extend beyond the term of the collective bargaining agreement to which it was signatory, but that the 1974 Benefit Plan was responsible for such benefits, regardless of the financial status of the employer, where the employer was no longer legally obligated to make payments. *Id.* at 29a-30a. The court concluded that "[t]he readoption of the language in the 1988 Agreement confirms that the judicial interpretations correctly represent the intent of the parties." *Id.* at 30a.

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[9] In response to petitioner's argument that the 1974 Benefit Plan was to provide benefits only to employees whose former employers were "no longer in business," the court observed that the language of the agreement referred to "*signatory* employer[s]" who were no longer in business. Pet. App. 28a. The court also noted that the "no longer in business" language was amended in 1981, without dissent from the union. The purpose of the amendment, the court said, was "to prevent employers from avoiding their obligations to their pensioners during the term of the agreement—not to deprive pensioners of their benefits upon the happening of contingencies entirely beyond their control." *Ibid.* The court concluded that the amendment was never intended to exclude any class of pensioners from coverage, since the union would surely have objected to a change of that magnitude.

The district court therefore held that the trustees had erroneously interpreted the NBCWA and plan documents "to preserve the corpus of the trust at the expense of the intended beneficiaries." Pet. App. 30a. It further held that under the terms of the 1988 NBCWA (Art. XX(h)), the signatory employers must "fully guarantee the solvency of the 1974 Benefit Plan with appropriate contributions." *Id.* at 31a. Accordingly, it ruled on the merits in favor of the individual plaintiffs and the UMWA. After further concluding that the plaintiffs had shown that they otherwise would suffer irreparable harm and that neither the BCOA nor the Plan would be substantially harmed, the court granted permanent injunctive relief to the plaintiff class. See *id.* at 48a-51a.[10]

On the BCOA's appeal, the court of appeals summarily affirmed without opinion. Pet. App. 1a-8a.[11]

DISCUSSION

Contrary to petitioner's primary contention, there is no conflict in the circuits on the appropriate standard of review. Moreover, the district court correctly reviewed the decision at issue under a de novo standard. Further review by this court is therefore not warranted.

1. Petitioner (Pet. 14) asks this Court to "clarify when and under what circumstances courts should defer to eligibility determinations by plan trustees following this Court's *Firestone* decision." To do so would be carrying coals to Newcastle. The issue of when trustees are entitled to deferential judicial review was precisely the one decided less than two years ago in *Firestone.*

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[10] As an alternative holding with respect to the trustees, but not the BCOA, the court determined (Pet. App. 32a, 34a) that the trustees were collaterally estopped from relitigating the issue of 1974 Benefit Plan responsibility for employees of non-signatory employers, since that issue had been decided adversely to them in *Royal II, Schifano,* and *Crockett* v. *Vecellio & Grogan, Inc.,* No. 85-1448 (S.D. W.Va. Feb. 4, 1987).

[11] The 1974 Benefit Plan trustees did not appeal from the district court's judgment.

What is more, we do not discern any state of confusion among the courts of appeals that would warrant further consideration at this time.

Before *Firestone*, a conflict existed among the circuits as to the appropriate standard of review. 489 U.S. at 107-108. Most courts applied the "arbitrary and capricious" standard of review; a few courts undertook heightened review under that standard when fiduciaries or administrators had some bias or adverse interest; and others applied de novo review in such conflict-of-interest cases. *Id.* at 107; see, *e.g.*, *Van Boxel* v. *Journal Co. Employees' Pension Trust*, 836 F.2d 1048, 1049-1050 (7th Cir. 1987) (collecting cases); *Bruch* v. *Firestone Tire & Rubber Co.*, 828 F.2d 134, 138-140 (3d Cir. 1987) (same), aff'd in relevant part, 489 U.S. 101 (1989).

This Court's decision in *Firestone* significantly changed the legal landscape. The Court held that "a denial of benefits challenged under [29 U.S.C.] § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." 489 U.S. at 115. The Court rejected as unwarranted "the *wholesale* importation of the arbitrary and capricious standard" into ERISA from analogous Labor-Management Relations Act (Section 302(c)(5)) cases. 489 U.S. at 109. Instead, the Court stressed that, in determining the appropriate standard of review, it was "guided by principles of trust law." *Id.* at 111. Those principles pointed toward a de novo standard, since courts would construe trust agreements, like other contracts, without deferring to either party unless the trust instrument gave the trustee discretion to construe uncertain terms. *Id.* at 111-113.

In this regard, the Court noted that, prior to ERISA, courts reviewed employee benefit claims under a de novo standard "by looking to the terms of the plan and other manifestations of the parties' intent," and observed that an arbitrary and capricious standard "would afford less

protection to employees and their beneficiaries than they enjoyed before ERISA was enacted," a result not likely contemplated by Congress. 489 U.S. at 113, 114. Thus, the Court concluded that in the absence of a grant of discretionary authority to the trustees, a de novo standard "applies regardless of whether the plan at issue is funded or unfunded [or] whether the administrator or fiduciary is operating under a possible or actual conflict of interest." *Id.* at 115.[12] The Court noted, however, that "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.' " *Id.* at 115, citing Restatement (Second) of Trusts § 187, Comment d (1959).

Since *Firestone*, there have been approximately 70 court of appeals' decisions applying, and in many instances discussing, the *Firestone* test; so far, all but the District of Columbia and Tenth Circuits have had occasion to invoke it.[13] To our knowledge, no court has indi-

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[12] In response to the argument that a de novo standard would lead to much higher administrative costs and increased litigation, the Court stated that benefit denials are subject to judicial review in any event, that parties can foreclose de novo review by agreeing on a narrower standard, and that "as to both funded and unfunded plans, the threat of increased litigation is not sufficient to outweigh the reasons for a *de novo* standard." 489 U.S. at 114-115.

[13] See, *e.g.*, *Curtis* v. *Noel*, 877 F.2d 159, 161 (1st Cir. 1989); *Heidgerd* v. *Olin Corp.*, 906 F.2d 903, 908 (2d Cir. 1990); *Anderson* v. *Pittsburgh-Des Moines Corp.*, 893 F.2d 638, 639 (3d Cir. 1990); *DeWitt* v. *State Farm Ins. Cos. Retirement Plan*, 905 F.2d 798, 800-801 (4th Cir. 1990); *Cathey* v. *Dow Chemical Co. Medical Care Program*, 907 F.2d 554, 558-559 (5th Cir. 1990); *Perry* v. *Simplicity Engineering*, 900 F.2d 963, 965 (6th Cir 1990); *Fuller* v. *CBT Corp.*, 905 F.2d 1055, 1058 (7th Cir. 1990); *Johnson* v. *Enron Corp.*, 906 F.2d 1234, 1237-1238 (8th Cir. 1990); *Jones* v. *Laborers Health & Welfare Trust Fund*, 906 F.2d 480, 481 (9th Cir. 1990); *Anderson* v. *Blue Cross/Blue Shield*, 907 F.2d 1072, 1075-1076 (11th Cir. 1990). Most, if not all, of these cases began before *Firestone*, and many had been decided by the district courts under a pre-*Firestone* standard. The courts have uniformly held, however, that *Firestone*

cated that the test is at all unworkable, unduly rigid, or vague, or that it leads to irrational results. To the contrary, the general view appears to be that, on the central issue of whether to apply a de novo standard or a more deferential standard of review, *Firestone* conveys "an admonition to courts that they refer to the common law of trusts for guidance in ERISA decisions." *Exbom* v. *Central States Health & Welfare Fund*, 900 F.2d 1138, 1142 (7th Cir. 1990).[14]

Nor have the courts of appeals diverged in applying *Firestone*'s presumption in favor of de novo review. As the Fifth Circuit has summarized, "[n]ot surprisingly, post-[*Firestone*] litigation has focused upon the language of ERISA-regulated plans and whether the instruments vest discretionary authority concerning entitlements with the fiduciary or administrator." *Cathey* v. *Dow Chemical Co. Medical Care Program*, 907 F.2d 554, 558 (5th Cir. 1990). That court emphasized that courts have consistently applied a de novo standard in the absence of clear evidence showing that a more deferential standard is warranted (*id.* at 559):

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applies to pending cases. See, *e.g.*, *Perry*, 900 F.2d at 965 n.2; *Michael Reese Hosp. & Medical Center* v. *Solo Cup Employee Health Benefit Plan*, 899 F.2d 639, 641 (7th Cir. 1990); *Orozco* v. *United Air Lines, Inc.*, 887 F.2d 949, 952-954 (9th Cir. 1989) (per curiam).

[14] The court in *Exbom* expressed uncertainty as to whether the post-*Firestone* abuse of discretion standard is identical to the pre-*Firestone* arbitrary and capricious standard. See 900 F.2d at 1142; *Lowry* v. *Bankers Life & Casualty Retirement Plan*, 871 F.2d 522, 525 (5th Cir.) (per curiam), cert. denied, 110 S. Ct. 152 (1989). The Eleventh Circuit has stated that it considers the two standards to be interchangeable. *Brown* v. *Blue Cross & Blue Shield of Ala., Inc.*, 898 F.2d 1556, 1558 n.1 (1990), cert. denied, 111 S. Ct. 712 (1991); see *id.* at 1560 n.4. Other subsidiary issues that have elicited judicial comment in the aftermath of *Firestone* concern how conflict of interest is to be considered under an abuse of discretion standard, see, *e.g.*, *Brown*, 898 F.2d at 1563 n.6, 1568, and whether the reviewing court is limited to the facts before the trustees or administrator in applying the de novo standard, see *Perry*, 900 F.2d at 966-967; *Moon* v. *American Home Assur. Co.*, 888 F.2d 86 (11th Cir. 1989). None of those questions is presented here.

> The courts of appeals that have considered, since [*Firestone*], the discretion granted by ERISA instruments consistently have rejected the argument that discretionary authority can be *implied* from the instrument's language. *See, e.g., Moon* v. *American Home Assur. Co.*, 888 F.2d 86, 88 (11th Cir. 1989); *Orozco* [v. *United Air Lines, Inc.*, 887 F.2d 949,] 952 [(9th Cir. 1989) (per curiam)]; *Brown* v. *Ampco-Pittsburgh Corp.*, 876 F.2d 546, 550 (6th Cir. 1989). * * * Accordingly, 'the circuit courts which have found that particular ERISA plans granted discretion to plan administrators or fiduciaries, * * *, have uniformly rested this finding upon *express language* of the ERISA plan before them.' *Moon*, 888 F.2d at 88.

Thus, when presented with express plan language that unambiguously confers discretion to construe the terms of a plan, courts have not hesitated to apply an abuse of discretion standard. See, *e.g., Fuller* v. *CBT Corp.*, 905 F.2d 1055, 1058 (7th Cir. 1990) ("The Board's plan, however, empowers the trustees 'to construe and interpret the plan.' * * * [T]his language brings a plan within *Firestone*'s exception for plans whose trustees are empowered to construe doubtful or contested terms—what else could the language we have quoted mean?"); *DeWitt* v. *State Farm Ins. Cos. Retirement Plan*, 905 F.2d 798, 801 (4th Cir. 1990); see also Pet. 21-22 & n.11 (citing cases).

The *Firestone* test is, of course, most easily applied when the plan language is unambiguous. On the other hand, courts confronted with ambiguous delegations of authority have engaged in some fine line-drawing. "A plan containing no provisions about construction accordingly leads to *de novo* review, while a plan expressly granting the trustee leeway yields deferential review. Not surprisingly, most plans, drafted before *Firestone*, are in between." *Sisters of the Third Order of St. Francis* v. *SwedishAmerican Group Health Benefit Trust*, 901 F.2d 1369, 1371 (7th Cir. 1990). The Seventh Cir-

cuit observed that "[c]ourts predictably have divided over the characterization of such ambiguous language." *Ibid.*, comparing *De Nobel* v. *Vitro Corp.*, 885 F.2d 1180, 1186-1187 (4th Cir. 1989); *Curtis* v. *Noel*, 877 F.2d 159, 161 (1st Cir. 1989); and *Lowry* v. *Bankers Life & Casualty Retirement Plan*, 871 F.2d 522, 524-525 (5th Cir.), cert. denied, 110 S. Ct. 152 (1989), treating similar plan language as granting discretion sufficient to require deferential review, with *Baxter* v. *Lynn*, 886 F.2d 182, 187-188 (8th Cir. 1989); and *International Bhd. of Elec. Workers, Local 47* v. *Southern Cal. Edison Co.*, 880 F.2d 104, 108 (9th Cir. 1989), construing similar language as leading to de novo review.

The Seventh Circuit's observation, however, falls far short of the suggestion (Pet. 22) that *Firestone* has engendered two distinct and divergent lines of cases.[15] The most that can be said is that various courts, applying the same legal test to similar but not identical facts, have occasionally reached different conclusions. That should come as no surprise; indeed, that result is characteristic of judicial construction of ambiguous contract language. But the pertinent point is this: the cases do not reveal the need for further illumination to guide the courts; rather, the substantial outpouring of post-*Firestone* decisions simply confirms that "the indicia of discretionary authority granted to administrators or fiduciaries will differ with each ERISA plan reviewed by a given court." *Baker* v. *Big Star Div. of the Grand Union Co.*, 893 F.2d 288, 292 (11th Cir. 1990). Moreover, discretionary authority over some matters does not connote equivalent authority over all matters. Thus, a given fiduciary may have the requisite discretionary authority "to determine eligibility for benefits," but not otherwise "to construe

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[15] By petitioner's analysis, the alleged "confusion" (Pet. 20) among the courts of appeals is as much intra-circuit as inter-circuit, since petitioner characterizes the Fourth Circuit's decision in *De Nobel* as falling into one line of cases, and the Fourth Circuit's decision in *Dzinglski* v. *Weirton Steel Corp.*, 875 F.2d 1075, cert. denied, 110 S. Ct. 281 (1989), as falling into the other line.

the terms of the plan," and vice versa.[16] It is therefore not inappropriate, as petitioner urges in describing a so-called "second line of post-*Firestone* authority" (Pet. 22-24), for a court to consider both the delegation language itself and the nature of the particular trustees' decision in order to determine whether the decision falls within the scope of broadly delegated authority.[17]

Furthermore, any difficulty courts may have experienced in applying *Firestone* to the universe of plan lan-

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[16] In addition, in determining the breadth of delegated authority, a court may appropriately consider extrinsic evidence of intent when construing ambiguous plan language. As this Court explained, "[t]he terms of trusts created by written instruments are 'determined by the provisions of the instrument as interpreted in light of all the circumstances and such other evidence of the intention of the settlor with respect to the trust as is not inadmissible.'" *Firestone*, 489 U.S. at 112 (quoting Restatement (Second) of Trusts § 4, Comment d (1959)).

[17] Viewed in this light, petitioner's two lines of cases are reconcilable, despite their different outcomes. In *Baxter*, 886 F.2d at 188, which involved interpretation of the plan's subrogation provision, the court stated that "[l]anguage requiring trustees to make a final determination of an employee's eligibility under the plan does not necessarily confer discretionary authority to render decisions with regard to ambiguous provisions of the plan." Although the plan in question gave the trustees "final authority to determine all matters of eligibility for the payment of claims" (court's paraphrase), it did not grant the authority to construe ambiguous terms; and the court therefore held de novo review to be appropriate for the latter function. *Ibid.* Similarly, in *Dzinglski*, 875 F.2d 1075, the court applied de novo review because the trustees did not base their denial of benefits on their admitted discretion to determine eligibility but rather on an exercise of the employer's management prerogative to deny early retirement status—a matter over which the trustees had no discretion. By contrast, in *De Nobel*, 885 F.2d at 1186 (emphasis added), the court reviewed the administrators' decision under a deferential standard because the plan clearly gave the administrators "broad discretion to pass on *precisely the sort of 'interpretive' questions* [regarding method of benefit payment] that led to the present dispute." And in *Lowry*, 871 F.2d at 524-525 (emphasis added), the court said that "the unambiguous language in the Plans mandates deference to the plan administrators *under the circumstances of this case*," thus prompting deferential review.

guage is likely to abate. Courts thus far have construed only plans written before *Firestone* made the precise terms of the delegated authority determinative of the standard of review for benefit denials. *Sisters*, 901 F.2d at 1371. Since *Firestone* does not "foreclose[] parties from agreeing upon a narrower standard of review" or, for that matter, making explicit that they intend that the decisions of trustees will be reviewed de novo, 489 U.S. at 115, that decision should encourage parties to amend plan documents to clarify their intentions with respect to the nature and scope of discretionary authority. Thus, any uncertainty reflected in the cases may simply be part of a transitional phase of post-*Firestone* law.[18]

2. The standard of review was not a primary focus of the courts below. Nonetheless, the district court considered the relevant factors when it determined that *Firestone* requires application of a de novo standard in this case. The court looked to the collective bargaining agreements and plan documents to discern whether they provided for a deferential standard. The court found no such provision; rather, it found that "[s]ince the restructuring of the Funds in 1974, the Trustees are without discretionary authority to establish eligibility standards or to construe the terms of the trust." Pet. App. 30a. We cannot fault either the court's mode of analysis or its conclusion.

If the 1974 Benefit Plan trustees have the requisite discretionary authority to invoke a deferential standard of judicial review, it is to be found in Article III of the trust document, which gives them "full authority * * * with respect to administration of coverage and eligibility, methods of providing or arranging for provisions for benefits, investment of trust funds and all other related

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[18] For that reason, it is at best premature to evaluate petitioner's claim (Pet. 27) that de novo review fosters excessive litigation of benefit denials under ERISA plans, a consideration which in any event this Court in *Firestone* deemed insufficient to justify a different standard of review. 489 U.S. at 114-115.

matters." See Pet. 17.[19] This language, in our view, is ambiguous. While "full authority" denotes broad discretion, the explicit scope of that authority—*administration* of coverage and eligibility, claims processing, and investment—is circumscribed.[20] Moreover, the language is noteworthy for the absence of any express authorization to construe or interpret the terms of the plan.[21] This omission is critical because the denial of coverage to a large class based on the construction of a contract provision cannot fairly be described as a mere exercise of discretion in administration. Cf. *Firestone*, 489 U.S. at 115 (characterizing the denial of severance pay to group of em-

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[19] Petitioner invokes (Pet. 16) two other provisions to support its position on discretion: Article XX(e)(4) and Article XX(g)(3) of the NBCWA. The one gives the trustees the right to sue on behalf of the plan, and the other gives them the power to investigate "the eligibility or ineligibility of any beneficiary." Neither provision is as broad as Article III or as directly relevant to the ultimate issue in this case.

[20] Petitioner places little or no reliance on the phrase "all other related matters" in Article III, see, *e.g.*, Pet. 8 n.6, and any such reliance would, in our view, be unwarranted. The phrase follows a series of circumscribed items and refers to other "related" matters. To read it as giving the trustees broad discretion to interpret ambiguous language would be to strain the phrase to the breaking point.

[21] In *Allied II*—a pre-*Firestone* case in which the court automatically applied the arbitrary and capricious standard—the Fourth Circuit construed Article III as giving the trustees the power "to interpret the provisions of the Trust." 765 F.2d at 416. We do not believe that after *Firestone* the Fourth Circuit would find an exception to the de novo standard based on this determination, since whatever authority the trustees possess to construe the plan is certainly not express or unambiguous. In *Michael Reese Hosp. & Medical Center* v. *Solo Cup Employee Health Benefit Plan*, 899 F.2d 639, 641 (1990), the Seventh Circuit construed strikingly similar plan language, giving the named fiduciary " 'authority to control and manage the operation and administration of the Plan' " (citation omitted), and held that "this provision does not give the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the Plan within the meaning of the [*Firestone*] exception." *Ibid.*

ployees based on the construction of a "reduction in work force" provision as "turn[ing] on the interpretation of terms in the plan at issue," for which the trustees were without fully delegated authority).

The district court aptly compared this ambiguous delegation of authority to the trustees' comprehensive pre-1974 authority. Cf. *Transportation-Communication Employees Union* v. *Union Pacific R.R.*, 385 U.S. 157, 161 (1966) (interpretation of collective bargaining agreement requires consideration of "the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements"). Until 1974, the trustees of the unified 1950 Plan had "full authority * * * with respect to *questions* of coverage and eligibility, priorities among classes of benefits, [and] amounts of benefits" (emphasis added). See *Robinson*, 455 U.S. at 565 n.2 (citing the 1950 NBCWA). In 1974, however, the BCOA and the UMWA not only divided that plan into four separate plans, but for the first time wrote into the NBCWA specific eligibility criteria and benefit amounts. *Id.* at 566; see Pet. App. 16a-17a. This change no doubt accounts for the simultaneous amendment of the "full authority" language, substituting "administration" for "questions" of coverage and eligibility, and deleting altogether the previous reference to "priorities among classes of benefits [and] amounts of benefits." Whatever else may be said about the post-1974 language, it is obvious that the trustees enjoy full authority over fewer matters relating to coverage and eligibility than before. There was thus a solid basis for the court's conclusion regarding the trustees' limited post-1974 authority.[22] Cf. *Robinson*, 455 U.S. at 573 ("[t]he petitioner

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[22] Comparison to the 1974 Pension Plan, in which the trustees make "full and final determinations as to all issues concerning eligibility for benefits" and "are authorized to promulgate rules and regulations to implement this Plan," is also apt. See *Richards* v. *UMW Health & Retirement Fund*, 895 F.2d 133, 135 (4th Cir. 1990); *Boyd* v. *Trustees of the UMW Health & Retirement Funds*, 873 F.2d 57, 59 (4th Cir. 1989). While petitioner contends (Reply Br. 4) that there is no difference between this 1974 Pension Plan

trustees [of the post-1974 1950 Benefit Plan] were not given 'full authority' to determine eligibility requirements and benefit levels, for these were fixed by the 1974 collective-bargaining agreement").

Petitioner appears to suggest (Reply Br. 2-3) that *Firestone*'s presumption of de novo review is inapplicable because the board of trustees is constituted, in accordance with Section 302(c)(5) of the LMRA, as a tripartite board with one neutral trustee. But this Court was well aware in *Firestone* that the decisions of the trustees of Section 302(c)(5) plans had been subject to review under the arbitrary and capricious standard. 489 U.S. at 109-110.[23] The Court described the "raison d'etre" of such deferential review as "the need for a jurisdictional basis in suits against trustees." *Id.* at 110. As with all employee benefit plans, this need disappeared with ERISA's enactment, for that statute applies fully to Section 302(c)(5) plans. *Ibid.*; see *Robinson*, 455 U.S. at 575; *Amax*, 453 U.S. at 332-334. The Court stressed in its earlier cases that "in enacting § 302(c)(5) 'Congress

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authority and that granted the same trustees in the administration of the 1974 Benefit Plan, there is a clear distinction in that under the Pension Plan, the trustees have "final" authority as to "all issues" of eligibility.

[23] The arbitrary and capricious standard that prevailed before *Firestone* has been described as "a range, not a point." *Van Boxel*, 836 F.2d at 1052; see *id.* at 1051 (noting that the deference given was less complete than that given to arbitrators "because courts of equity traditionally exercise broad supervision over trustees"). In applying this standard, there is no reason to believe that courts, as a rule, gave greater deference to decisions of Section 302(c)(5) trustees than to those of other fiduciaries. See, *e.g.*, *Kosty* v. *Lewis*, 319 F.2d 744, 747 (D.C. Cir. 1963), cert. denied, 375 U.S. 964 (1964) ("the Trustees [of the UMWA Health and Retirement Fund of 1950], like all fiduciaries, are subject to judicial correction in a proper case upon a showing that they have acted arbitrarily or capriciously"). In particular, the lengthy history of litigation involving challenges to eligibility determinations by the trustees of the UMWA Health and Retirement Fund of 1950 reveals an increasing tendency to subject those determinations to heightened review under the arbitrary and capricious standard. See *Maggard* v. *O'Connell*, 671 F.2d 568, 570-572 (D.C. Cir. 1982).

intended to impose on trustees traditional fiduciary duties'" as set forth in the common law of trusts. *Robinson*, 455 U.S. at 573 n.12, quoting *Amax*, 453 U.S. at 330. Since the common law of trusts also provides the underpinning of the *Firestone* holding, and since *Firestone* does "not rest * * * on the concern for impartiality" that is the hallmark of Section 302(c)(5), the Court clearly meant what it said when it stated that "we need not distinguish between types of plans or focus on the motivations of plan administrators and fiduciaries." *Firestone*, 489 U.S. at 115. Thus, the same rules of construction pertain to Section 302(c)(5) plans as to all other plans.

Finally, the fact that application of a more deferential standard of review might ultimately make no difference in this case militates strongly against further review. The district court stated that, "assuming that the appropriate test of trustee discretion is the 'arbitrary and capricious' standard, as urged by the Trustees, we find that the decision to deny benefits to these pensioners was arbitrary and capricious." Pet. App. 30a. That conclusion was based on a thorough analysis of the collective bargaining history, from which the court deduced that the trustees' construction "would have the effect of defeating the expressed intention of the parties to provide lifetime benefits to these pensioners, and render the promise of lifetime benefits illustory." *Id.* at 31a. Moreover, that conclusion is in line with the consistent holdings of other courts (such as the Fourth Circuit in *Royal II*), prior to this Court's decision in *Firestone*, that the denial of coverage under similar circumstances was arbitrary and capricious. *Ibid.*[24]

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[24] The government shares petitioner's concern (Pet. 28) with respect to the long-term financial viability of the plan at issue. Partly to address that concern, the Secretary of Labor is reviewing the November 1990 final report of the Advisory Commission on the United Mine Workers of America Retiree Health Benefits, which addresses health care issues arising from the 1950 and 1974 UMWA Benefit Plans and the effects of resolving those issues on the coal industry as a whole.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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